

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Waiver of Digital Testing Pursuant)	MB Docket No. 05-317
to the Satellite Home Viewer Extension)	
and Reauthorization Act of 2004)	

**CONSOLIDATED REPLY OF HEARST-ARGYLE STATIONS, INC.,
OHIO/OKLAHOMA HEARST-ARGYLE TELEVISION, INC.,
WAPT HEARST-ARGYLE TELEVISION, INC., AND WPBF-TV COMPANY
TO THE OPPOSITION OF ECHOSTAR SATELLITE L.L.C.**

Hearst-Argyle Stations, Inc., licensee of KCRA-DT, Sacramento, California, Ohio/Oklahoma Hearst-Argyle Television, Inc., permittee of KOCO-DT, Oklahoma City, Oklahoma, WAPT Hearst-Argyle Television, Inc., permittee of WAPT-DT, Jackson, Mississippi, and WPBF-TV Company, permittee of WPBF-DT, Tequesta, Florida, (collectively “Hearst”) hereby reply to the Opposition of EchoStar Satellite L.L.C. (“EchoStar”) filed on December 30, 2005, in the above-referenced proceeding.¹

On November 29, 2005, pursuant to Section 339(a)(2)(D)(vii) of the Communications Act, each of the Hearst entities referenced above requested digital testing waivers for their respective digital stations based on each station’s use of a side-mounted antenna. Significantly, each Hearst station, in its respective waiver request, demonstrated that it met the statutory criteria for a digital testing waiver. Because the Hearst stations have met the criteria, the burden has shifted to satellite

¹ On December 30, 2005, DIRECTV, Inc. filed comments in this proceeding. Because DIRECTV’s comments were not directed specifically to any of the Hearst waiver requests, the instant reply does not address DIRECTV’s comments. Hearst understands that the Commission will consider carefully the waiver requests in this proceeding as it does all waiver requests.

providers to provide an overarching public interest justification for denying the requested waivers. EchoStar has opposed each of these waiver requests on the grounds that, in each case, the waiver request (1) is premised upon impermissible financial exigency and (2) fails to demonstrate that the station's current operation represents a substantial decrease in the station's digital signal coverage area. EchoStar is plainly wrong on both points and has not met its burden of justifying a denial of waiver requests that meet the statutory criteria.²

First, SHVERA sets forth six specific statutory bases on which waiver requests may be granted, including where "the station experiences a substantial decrease in its digital signal coverage area due to the necessity of using a side-mounted antenna." 47 U.S.C. § 339(a)(2)(D)(viii)(IV). Each of the Hearst stations has submitted a waiver request presenting precisely such a case. Contrary to EchoStar's cut-and-paste litany, none of the Hearst waiver requests is founded upon impermissible "financial exigency." As indicated in Hearst's waiver requests, Hearst's use of side-mounted digital antennas is in the public interest: the premature use of top-mounted digital antennas by KCRA-DT, KOCO-DT, and WPBF-DT would require the corresponding station's top-mounted analog antenna to be moved to a side-mounted position, resulting in a substantial loss of existing analog service to viewers.

Moreover, contrary to EchoStar's assertion that "[a]t the very least [each station referenced above] should have investigated other alternatives to a side-mounted antenna (*e.g.* using a separate tower or different orientation) and presented evidence of its efforts in this regard,"³ neither the statute

² Because DIRECTV has not specifically addressed the Hearst waiver filings, DIRECTV has not met its burden either.

³ EchoStar Opposition at 39-40, 42-43, 49; *see also id.* at 58 (arguing, with respect to (continued...))

nor the Commission's Public Notice require any such showing—either explicitly or implicitly. To read such a requirement into the testing waiver provisions of SHVERA would elevate the “clear and convincing” evidence standard set forth in SHVERA into a “beyond a reasonable doubt” standard, because it would require stations to explain away every other possible digital facility transmission permutation that the station—or, apparently, EchoStar—could have conceived. Of course, no Hearst station made its transmission facility decisions based upon whether it would qualify for a waiver of the digital testing provisions. That decision was made long before SHVERA and its digital white area testing waiver provisions were enacted. Indeed, most stations nationwide—and all of the Hearst stations at issue here—made their transmission facility decisions based on factors such as replication/maximization patterns, service to the public, and existing practical constraints such as the location of the analog antenna and strength of the supporting tower. In making its arguments about the clear and convincing standard, EchoStar is attempting to rewrite the clear language of the statute. There is no basis in the statute for EchoStar's assertion that the “clear and convincing” standard means that a digital station must now justify its decisions for using a side-mounted antenna by explaining its rejection of other, theoretical transmission facilities. Nor does the “clear and convincing” evidence standard, as EchoStar asserts, “demonstrate[] an intent to limit viewers to those broadcasters who could not provide full digital service because of circumstances that are beyond their control.”⁴ Rather, SHVERA's requirement that the evidence be “clear and convincing”

³(...continued)

WAPT-DT, that the “clear and convincing evidence standard requires WAPT to at least outline alternatives to side-mounting (*e.g.* operations from a different location) that it considered, if any, and to explain why it settled on side-mounting”).

⁴ EchoStar Opposition at 3 (internal quotations omitted).

demonstrates only that there is no presumptive right to obtain a waiver and that the Commission should consider carefully all such requests. All of the Hearst waiver requests meet the clear and convincing evidence standard.

Second, SHVERA requires, in relevant part, that, to qualify for a digital testing waiver, a station's use of a side-mounted antenna result in a "substantial decrease" in signal coverage area. In each of the Hearst stations' waiver requests (discussed briefly below)—and even in EchoStar's own filing—the decrease in population coverage as a result of each station's necessary use of a side-mounted antenna meets the threshold of "substantial."

KCRA-DT. As set forth in Hearst's waiver request filed with respect to KCRA-DT, it is physically impossible for KCRA-DT to construct its DTV top-mount replication facility at its allotted height because the station's NTSC antenna is located at the top of the tower. The unavailability of the tower top is not a "financial exigency," as EchoStar disingenuously characterizes it, but it is an unremediable circumstance—absent a substantial loss of service to existing NTSC viewers—necessitating Hearst's use of a side-mounted antenna for KCRA-DT. As noted in the waiver request, the difference between KCRA-DT's current coverage area and KCRA-DT's replication coverage area from its top-mount facility is 355,302 people. (By EchoStar's own analysis, the difference is 380,412 people.⁵) EchoStar's characterization that 355,302 or 380,412 people is a "small difference" that is "not . . . 'substantial'" is absurd.

KOCO-DT. As set forth in Hearst's waiver request filed with respect to KOCO-DT, it is physically impossible for the supporting tower to support KOCO-DT's antenna at its maximized HAAT until the KOCO-TV antenna is removed from the top of the tower at the end of the digital

⁵ EchoStar Opposition, Hammett & Edison Report at 2.

transition. The unavailability of the tower top is not a “financial exigency,” as EchoStar disingenuously characterizes it, but it is an unremediable circumstance—absent a substantial loss of service to existing NTSC viewers—necessitating Hearst’s use of a side-mounted antenna for KOCO-DT. As for EchoStar’s suggestion that Hearst could operate KOCO-DT at a higher power pursuant to STA and thereby cover a larger population, EchoStar’s argument is unfounded and ignores reality. KOCO-DT’s STA transmitter is the transmitter that will be used when KOCO-DT’s facility increases to full power. The transmitter is currently operating at the highest level possible within safe engineering practices given the configuration of the facility. For KOCO-DT to operate at the 56.8 kW of power suggested by EchoStar, Hearst would have to procure a more powerful transmitter. SHVERA does not require such a frivolous and costly purchase. As noted in the waiver request, the difference between KOCO-DT’s current coverage area and KOCO-DT’s maximization coverage area from its final facility is more than 11,000 people, while EchoStar’s own analysis shows more than 15,000 “lost” viewers.⁶ Clearly, 15,000+ people is a “substantial” number.

WAPT-DT. As set forth in Hearst’s waiver request filed with respect to WAPT-DT, it is physically impossible for WAPT-DT to construct its DTV top-mount replication facility at its allotted height until the antenna for WJMI(FM) is removed from the top of the tower, which is scheduled to occur prior to the end of the DTV transition. The unavailability of the tower top is not a “financial exigency,” as EchoStar disingenuously characterizes it, but it is an unremediable circumstance necessitating Hearst’s use of a side-mounted antenna for WAPT-DT.⁷ As noted in the

⁶ EchoStar Opposition, Hammett & Edison Report at 4.

⁷ The operative criterion in SHVERA allows digital stations operating with a side-mounted antenna for any reason to seek a waiver of the digital testing provisions. The fact that WAPT-DT’s
(continued...)

waiver request, the difference between WAPT-DT's current coverage area and WAPT-DT's maximization coverage area from its top-mount facility is 53,411 people. Clearly, 53,411 people is a "substantial" number.

WPBF-DT. As set forth in Hearst's waiver request filed with respect to WPBF-DT, it is physically impossible for WPBF-DT to construct its DTV top-mount replication facility at its allotted height until the station's NTSC top-mount antenna is removed at the end of the DTV transition. The unavailability of the tower top is not a "financial exigency," as EchoStar disingenuously characterizes it, but it is an unremediable circumstance—absent a substantial loss of service to existing NTSC viewers—necessitating Hearst's use of a side-mounted antenna for WPBF-DT. As noted in the waiver request, the difference between WPBF-DT's current coverage area and WPBF-DT's maximization coverage area from its top-mount facility is 169,837 people. Clearly, 169,837 people is a "substantial" number.

Conclusion

For the reasons set forth above and in each Hearst station's respective waiver request, the digital testing waivers for each of the aforementioned Hearst stations should be granted. EchoStar's Opposition to those waiver requests should be denied.

⁷(...continued)
side-mounted operations are the result of a radio station's lawful presence at the top of the tower is irrelevant to whether WAPT-DT satisfies Section 339(a)(2)(D)(viii)(IV).

Respectfully submitted,

**HEARST-ARGYLE STATIONS, INC.,
OHIO/OKLAHOMA HEARST-ARGYLE
TELEVISION, INC., WAPT HEARST-
ARGYLE TELEVISION, INC., AND
WPBF-TV COMPANY**

/s/

David Kushner
Coe Ramsey
Stephen Hartzell

BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
Wachovia Capitol Center, Suite 1600
150 Fayetteville Street (27601)
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300
Facsimile: (919) 839-0304

Their Attorneys

January 17, 2006

Certificate of Service

The undersigned, of the law firm of Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., hereby certifies that s/he has caused a copy of the foregoing **Consolidated Reply of Hearst-Argyle Stations, Inc., Ohio/Oklahoma Hearst-Argyle Television, Inc., WAPT Hearst-Argyle Television, Inc., and WPBF-TV Company to the Opposition of EchoStar Satellite L.L.C.** to be placed in the U.S. Mail, first-class postage prepaid, addressed as follows:

David K. Moskowitz
EchoStar Satellite L.L.C.
9601 South Meridian Boulevard
Englewood, CO 80112

William M. Wiltshire
Michael Nilsson
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, DC 20036

Susan Eid
Stacy R. Fuller
DIRECTV, Inc.
444 North Capitol Street, NW
Suite 728
Washington, DC 20001

This the 17th day of January, 2006.

/s/

Sandra S. Kreps